No. 21,136

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and MARK FLETCHER,

Appellants,

-vs-

JOHN W. JARRETT and JUANITA F. JARRETT,

Appellees.

BRIEF OF APPELLANTS

Appeal from the United States District Court,
District of Idaho, Southern Division

BRYAN P. LEVERICH,
Salt Lake City, Utah
E. C. PHOENIX
D. A. BYBEE
F. L. RINGE
Pocatello, Idaho

Attorneys for Appellants.

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No. 21136

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NION PACIFIC RAILROAD COMPANY, A Corporation,)
id MARK FLETCHER,

Appellants,)

-vs-)

OHN W. JARRETT and JUANITA F. JARRETT,)

Appellees.)

APPELLANTS' OPENING BRIEF

STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS

This action was commenced in the United States District Court for the strict of Idaho, Southern Division, seeking damages for the alleged wrongful death Catherine Joan Jarrett, daughter of John W. Jarrett and Juanita F. Jarrett, pellees. Appellees are citizens and residents of the State of Kansas (C.T. 6. All ferences hereinafter to "C.T." are to Clerk's Transcript, Volume One of Three lumes of the record on this appeal). Defendants were the Union Pacific Railroad mpany, a Utah corporation, Mark Fletcher, a resident and citizen of Idaho, (C.T.6) l Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, deceased, who s at his death a citizen and resident of the State of Idaho (C.T 6). The amount in troversy exceeds $10,000.00, exclusive of interest and costs (C.T. 7).

Jurisdiction of this action was founded on diversity of citizenship and the ount in controversy and results from the provisions of 28 U.S.C.A. Sec. 1332 (T. 7).

Jurisdiction for the review of this matter is conferred by the provisions of 28 U.S.C.A. Sec. 1291 and Rule 73, Federal Rules of Civil Procedure.

On October 12, 1964, John W. Jarrett and Juanita F. Jarrett instituted an action against the Union Pacific Railroad Company, a Utah corporation, Mark Fletcher and Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased, seeking $1,000.00 special damages and $150,000.00 general damages alleging the same arose from the death of their daughter Catherine Joan Jarrett in a collision between a train operated by the Railroad Company and Mr. Fletcher and an automobile operated by decedent Herbert E. Nelson at a railroad crossing in Boise, Idaho on February 15, 1964. (C.T. 6-11). The collision was alleged to have occurred as the result of negligent, careless, wrongful, reckless and unlawful acts on the part of all of the defendants. (C.T. 9).

Separate answers were filed by the Union Pacific Railroad Company and its employee, Mark Fletcher (C.T. 22-27), and by Alma Nelson (C.T. 52-56). The case came on for jury trial commencing November 29, 1965 (C.T. 220). Motions for a directed verdict were made by appellants Union Pacific Railroad Company and Mark Fletcher at the conclusion of the plaintiffs' evidence (C.T. 223) and at the close of all of the evidence (C.T. 227) and denied each time. On December 2, 1965 the jury returned a verdict in favor of appellees and against all defendants in the sum of $60,000.00 (C.T. 229), and judgment was entered thereon forthwith (C.T. 230).

On December 10, 1965, appellants filed their Motion for Judgment Notwithstanding the Verdict or for a New Trial (C.T. 235-238) which were by the Court denied on March 1, 1966 (C.T. 312), whereupon this appeal was taken from the final judgment and from the order denying said motion for judgment notwithstanding the verdict or for a new trial.

This Court is without jurisdiction to review that portion of the judgment which was entered in favor of John W. Jarrett and Juanita F. Jarrett and against

Alma Nelson, Administratrix of the Estate of Herbert E. Nelson, Deceased (C.T. 230) or the reason that the same has become final, no appeal having been taken by Alma Nelson.

STATEMENT OF THE CASE

On February 15, 1964 at about 8:55 p.m., Catherine Joan Jarrett, aughter of appellees, entered the vehicle of Herbert E. Nelson to ride to Nelson's ouse to babysit for the Nelson children (RT 280-283. All references hereafter to R.T." refer to the Reporter's Transcript, which are volumes two and three of the ecord on appeal). A Mr. Bradbury also was in the vehicle. They left the Jarrett ouse on South Wilson Street in Boise, Idaho where Catherine lived with her parents nd two younger siblings, (R.T. 275, 276) drove east on Grover Street to Roosevelt treet and turned north toward the home of Nelson (R.T. 201, 202). Several blocks ater, they approached the tracks of the Union Pacific Railroad Company (R.T. 201, 03).

The streets were ice covered and extremely slick (R.T. 70). Mr. Nelon's car had been observed skidding as he turned onto Roosevelt, (R.T. 202) and it as seen slipping just before the accident (R.T. 78, 79, 204). After the accident, is blood alcohol content was measured at 149 milligrams (R.T. 301), at which level man is intoxicated (R.T. 304).

As the Nelson vehicle approached the tracks, there was also approachig Train No. 12 of the Union Pacific Railroad Company, with Mark Fletcher acting engineer (R.T. 130). This was a passenger train, with two motor units and seven rs (R.T. 150, 151). Its headlights were on, and also a swinging light called a Mars ght (R.T. 158). There is evidence the engine bell was ringing and its whistle was owing at intervals (R.T. 147, 148, 158). The train was moving between a speed timated by the engineer at 55 to 60 miles an hour (R.T. 159) and approximately 6 miles an hour as indicated by the speed tape from the engine, Exhibit 27. A rail-

road speed limit in this area was 60 miles an hour (R. T. 137) and the train was slo ing down for that and for the Boise depot about one and a half miles ahead, at which the train was to stop. There were no vehicles approaching the tracks on Roosevelt from the north and none on a parrallel street known as Alpine Street (R. T. 79). Roosevelt Street intersects with Alpine Street just south of the tracks. At the inter- section of the two streets and the railroad tracks there is an overhead street light, a cross-buck railroad sign on either side of the tracks at the tracks and stop signs o either side of Roosevelt on Alpine, at the south side of Alpine on Roosevelt and at th north side of the railroad tracks on Roosevelt. The stop sign on the south is approx mately 105 feet from the tracks, Exhibit 41.

A car somewhat ahead of the Nelson vehicle stopped at the stop sign ar after the driver observed the train and noted it was far enough away not to be an immediate hazard, started up and drove over the tracks (R. T. 228, 229). The Nels vehicle came up to the intersection without stopping at the stop sign (R. T. 169). Fo a brief moment its brake-lights flashed as it was skidding slightly, then it moved in front of the train and was struck at the left front portion of the vehicle (R. T. 75, 76 At the time it passed the stop sign without stopping, the train was approximately 60 feet from the crossing (R. T. 167).

There is a line of trees and bushes on the south side of Alpine west of Roosevelt, from which direction the train approached (Exhibit 40). The leaves we off the bushes and the tree branches are above eye level. There is a place where a driver could not see to the west along the tracks, but prior to reaching that point an after passing it, the driver could see at least to Garden Street to the west, approxi mately 1, 300 feet (R. T. 350, 351). In the vicinity of the stop sign, or just past it, view is substantially unobstructed to the west for thousands of feet (Exhibits 21, 22) There are no distracting lights, or noises, or atmospheric or industrial conditions or factors which would obscure the headlights of the train or render its whistle signals indistinct.

At the time the first car went over the crossing, the train was in the vicinity of Garden Street (R. T. 229). One witness, Wood, who saw the train at that time, stated he did not hear a whistle at that time. He felt he could have heard one if it had blown, but at an earlier time he had given a written statement, which was introduced in evidence, that the whistle could have blown and he not have heard it because a wind was blowing away from the tracks, the heater was on and the windows were rolled up (R. T. 215, 216, Ex. 32). His daughter was paying no attention to his driving or the circumstances and did not even see the train (R. T. 119, 126). The driver behind the Nelson car, Mrs. Van Engelen, said she did not hear any whistles, but that they could have sounded and she not have heard them (R. T. 85).

All positive testimony about whistle signals was to the effect they were sounded. Mr. Leaper, called by appellees, lives by the crossing and said he heard them prior to the sound of the impact (R. T. 96, 104); Mrs. Nichols lives west of the crossing and remembers the train going by her house, whistling at the time (R. T. 378-382); young Danny Ramsey was playing outside and heard the whistles, then the sound of the impact (R. T. 374, 375). Mr. Leaper said he heard a screeching noise just before the impact like a car's tires spinning and Mrs. Nichols said after she heard the regular and usual whistles, the train whistled a peculiar, loud tone again. It is obvious these witnesses were referring to a last whistle blast just before the accident that the engineer also testified to.

The engineer and fireman testified to the operation of the train, stating that its speed was around 70 miles an hour as the train approached Boise, that an initial application of air was made to slow the train down gradually for the stop at Boise, that whistle signals are almost constant going through Boise because crossings are close but that the bell is turned on at the west edge of town and just left on (R. T. 129-184; 383-400). It was on at the time of the accident. The headlight of the train was on bright and the oscillating, or Mars, light also was shining, swinging back and forth from side to side (R. T. 387-390).

As the train approached Roosevelt street, the automobile had not yet reached the stop sign. The oscillating light was swinging over as far as the car and hitting it, but the car did not stop at the stop sign nor any place between there and the crossing. It was moving slowly and the engineer expected it to stop at any moment, but when it did not, he applied the brakes in emergency, which is all he could do to avoid the accident at that time (R. T. 158). The train stopped in about half a mile or longer. The impact threw the automobile to the southeast of the crossing, killing all three occupants (R. T. 259, 260).

Appellees produced evidence that Catherine was a good student and had a cheerful disposition, that they missed her very much and still felt grief over her death. No evidence was presented of any expectation of appellees that Catherine would contribute money to their support or that they were deprived of anything material. There are five married older children living away from home and two surviving younger children in the home.

QUESTIONS PRESENTED AND MANNER IN WHICH THEY ARE RAISED

The questions presented by this record are: Whether the admitted negligence of the driver of the vehicle in which Catherine Joan Jarrett was riding in failing to stop for the stop sign at the intersection of Roosevelt Street and the railroad tracks of the Union Pacific Railroad Company in Boise, Idaho on the night of February 15, 1964 and thereafter his failure to see and stop for the train which was then and there approaching either because he failed to look or Catherine failed to warn him or else he was driving too fast to stop, were intervening, superceding acts of negligence which constituted the sole proximate cause of the accident, so that acts of negligence on the part of the Railroad Company or the engineer Fletcher, if any, presented only conditions and thus there was no issue of negligence on the part of appellants to submit to the jury; and, whether even if there was an issue, there was no substantial evidence of negligence on the part of appellants to justify the verdict rendered, so

hat a new trial should be granted appellants. These questions were preserved by notion for directed verdict, made both at the end of appellees' case (R. T. 329-333), nd at the conclusion of all evidence (R. T. 401-407), and renewed in appellants' imely motion for judgment notwithstanding the verdict or for new trial (C. T. 235-38).

In addition, the question is presented as to whether, even assuming there vas a justiciable issue as to negligence, the verdict and judgment are too high, and so ross as to indicate the jury was swayed by passion and prejudice. This question was reserved by appellants' timely motion for a new trial.

SPECIFICATION OF ERRORS

I.

The trial court erred in failing to grant the motion for directed verdict nade by appellants at the close of the evidence of appellees, because there was no vidence of negligence on the part of appellants which was a proximate or contributing ause of the accident.

II.

The trial court erred in failing to grant the motion for directed verdict enewed by appellants at the close of all of the evidence because there was no evidence f negligence on the part of appellants which was a proximate or contributing cause of he accident.

III.

The trial court erred in failing to grant the motion for judgment notwithtanding the verdict for the same reasons set forth in paragraphs I and II above.

IV.

The trial court erred in failing to give the instruction requested by ppellants which reads as follows, as set forth in the statement of points under Rule 7 (6):

"You are instructed that if you find from all of the evidence that the collision between the automobile and the train would not have occurred except for the ice on the street, then the ice was the sole proximate cause of the accident, irrespective of the acts of the Railroad Company or its employees, and you must return a verdict for the defendant Railroad Company and its employee."

V.

The trial court erred in failing to grant to appellants a new trial on the basis that the verdict and the judgment entered thereon are not supported by substantial evidence as to these appellants.

VI.

The trial court erred in failing to reduce the judgment as being excessive and in failing to grant to appellants a new trial on the issue of damages, the amount of the verdict indicating that the jury was punishing all of the defendants for the gross and drunken behavior of the driver of the automobile, despite the fact that there was nothing appellants could do when Nelson drove through the stop sign and in front of the train to prevent the accident at that time.

SUMMARY OF THE ARGUMENT

WITH POINTS AND AUTHORITIES

I.

Motorists are under a positive duty to maintain a lookout as they approa railroad crossings, from a place where their looking will be effective to see and hear what a person in the exercise of ordinary care and caution for the safety of himself a others would see and hear under like circumstances. Railroad trains have the right of way at crossings and Section 49-747, Idaho Code, imposes upon travelers a standa of conduct required of persons approaching railroad crossings, violation of which standard constitutes negligence per se, so that approaching a grade crossing without reducing speed and without having his vehicle under such control that he can stop for approaching trains, is negligence per se on the part of the driver herein. This oblig

ion also is imposed upon passengers, and failure by them to warn drivers or exercise are in looking or their acquiescence in the negligent operation of a car amounts to ontributory negligence on their part.

Ralph v. Union Pac. R. Co., 82 Idaho 240, 351 P. 2nd 464;

Ineas v. Union Pac. R. Co., 72 Idaho 390, 241 P. 2nd 1178;

Drury v. Palmer, 84 Idaho 558, 375 P.2d 125;

State v. Papse, 83 Idaho 358, 362 P.2d 1083;

Howard v. Missman, 81 Idaho 82, 337 P.2nd 592;

Yearout v. Chi. M.St.P. & Pac. R. Co., 82 Idaho 466, 354 P. 2nd 759;

Stowers v. Union Pac. R. Co., 72 Idaho 87, 237 P. 2d 1041.

2.

The operators of trains are under no legal obligation to slow or stop a rain at a grade crossing merely upon observing the approach of an automobile, and eed not operate the trains prepared to stop under any circumstance which may arise. hey have the right to believe that persons approaching a crossing will obey the law nd will look and listen and stop where required, and will in any event stop and yield o a train its prior right of way over the crossing and this assumption is justified until here is some reasonable basis for believing the operator of the vehicle will not stop nd yield. Failure to stop at a traffic control device requiring a motorist to stop, and o remain standing until safe to proceed, is violation of a statute designed to protect he traveler and is negligence per se.

McIntire v. O.S.L. R. Co., 56 Idaho 392, 55 P. 2nd 148;

Ralph v. Union Pac. R. Co., supra;

Whiffin v. Union Pac. R. Co., 60 Idaho 141, 89 P. 2nd 540;

Ineas v. Union Pac. R. Co., supra;

Testo v. O.W.R. & N. Co., 34 Idaho 765, 203 Pac. 1065;

Section 49-747, Idaho Code;

Section 49-748, Idaho Code;

3.

Section 62-412, Idaho Code, the so-called "whistle statute" does not require an engineer to sound whistle signals in cities, and accordingly failure to do so in a city is not negligence per se. If a whistle is sounded in such fashion within a city as to give notice of the approach of a train to travelers in time enough for them in the exercise of ordinary care, to avoid the accident, then no negligence in the sounding of whistle signals can be found.

Section 62-412, Idaho Code;

Ineas v. Union Pac. R. Co., supra.

4.

No speed at which a train may be running justifies a traveler in going upon railroad tracks without looking and listening, effectively, for the approach of trains and exercising due care and caution, and the speed of the train in this case had nothing to do with the accident where the driver of the vehicle drove through a stop sign intended to prevent automobiles from driving onto tracks when trains were in hazardous proximity. Such act under the Idaho guest statute became a successive, intervening cause of the accident, which is a matter the court may determine as a question of law.

Section 49-1401, Idaho Code;

38 Am. Jur. Sec. 352, pp 1060-1;

Whiffin v. Union Pac. R. Co., supra;

Bailey v. Erie R. Co., DC, Ohio, 143 F. Supp. 351.

5.

There is some testimony the driver of the car was having trouble controlng his car due to ice. If ice on the pavement prevented the driver from stopping, hen irrespective of any acts of negligence on the part of defendants, the proximate ause of the accident was the ice and no issue remained to submit to the jury.

Whiffin v. Union Pac. R. Co., supra;

Ineas v. Union Pac. R. Co., supra;

Hickey v. Mo. Pac. Ry. Corp., 8th Cir. 8 F.2nd 128;

Megan et al. v. Stevens, et al., 8th Cir., 91 F. 2nd 419, 113 ALR 992;

Hart v. Wabash R. Co., 7th Cir., 177 F.2nd 492.

6.

Where there is evidence concerning the facts of an accident and how it appened, there is no presumption of due care. In this case, there were at least our eye witnesses to the accident, and no presumption exists in this case.

Mundy v. Johnson, 84 Idaho 483, 373 P.2nd 755;

Drury v. Palmer, supra;

Domingo v. Phillips, 87 Idaho 55, 390 P.2nd 297.

7.

An appeal court may review the verdict of a jury and if an award is xcessive, or appears to have been given under the influence of passion or prejudice, t may grant a new trial or may order a reduction in the amount.

Checketts v. Bowman, 70 Idaho 463, 220 P.2nd 682;

Covey Gas & Oil Co., v. Checketts, 9th Cir., 187 F. 2nd 561.

A few comments are in order at this point regarding some of the facts set out above. Exhibits 21, 22 and 43 in evidence reveal the physical nature of the crossing and demonstrate that a motorist approaching from the south has at first a view through leafless branches an ever-widening distance to the west in the direction from which the train approached, and then when he reaches the area of the stop sign, either a little behind the one place where view might be obstructed to the west or a little ahead of it at the place Mr. Wood said he stopped and had a clear view to the west, (R. T. 228), the motorist can see at least to Garden Street a quarter of a mile west. (R. T. 229) Thus, the train involved in the collision would have been in view at all times while the Nelson vehicle approached the crossing, from a point at least 150 feet south of the tracks.

There are no public speed regulations at this location, only a railroad imposed limit for its own purposes because the area involved is within the yard limit. (R. T. 137, 180) Speed of the train did not prevent it from being seen, nor were the trees and bushes any substantial obstruction to view as the exhibits referred to demonstrate. The little signal shack appearing in Exhibit 21 and the telephone poles and other poles on the right of way constitute no obstruction to view whatsoever, as reference to the exhibits will reveal.

The whistle testimony is such that no doubt is left that whistle signals were given and that at all times when the automobile was at or approaching or passing the stop sign, the signals were being sounded and the headlights of the engine were shining. Anyone in the vehicle who looked could have seen the train and anyone in it who listened could have heard the whistles. The failure to stop at the stop sign, or before reaching the tracks, can only indicate negligence on the part of the driver and all occupants of the vehicle. They were under the positive commands of Idaho law to look and listen and stop where necessary, not only in response to the command of the stop sign, prior to reaching the tracks, and failure so to do constitutes negligence.

Add the facts that the streets were icy slick and that motorists had trouble controlling their cars, and one reaches the inescapable conclusion that under the law as summarized above and the facts, the sole proximate cause of the accident was the successive, intervening negligence of the driver and his passengers.

TRAIN NEED NOT TRAVEL PREPARED TO STOP AT ALL TIMES

It is immaterial whether or not the operators of the train knew of the street conditions in Boise. What could they do about it? Operating at a slower speed would not have prevented this accident. Weather conditions did not interfere with the operation of the train and going slower could not help travelers. It is not possible for trains to stop prior to reaching crossings under all circumstances and the distance required for this train to come to a stop shows it was not possible here. If trains had to operate so they could stop before reaching any particular crossing, it would mean that trains would have to move slower and slower as they approached each crossing until finally just before getting to it they would have to come to a complete stop to insure that some drinking driver who runs stop signs would not collide with them. Obviously, this is impossible. 44 Am. Jr. 511, p. 751. Conner v. Penn R. Co., 163 F. Supp. 718, 723, affd. 263 F. 2nd 944. The force of such an argument is that as motorists exercise less and less care, operators of trains must exercise more and more care. This never has been and is not now the law. Ordinary care does not require trains to be operated at such speeds that they can be stopped within the range of vision at a railroad crossing. Owens vs Chi, Rock Island & P. RR Co., 292 F 2d 696.

On the other hand, inclement weather is something a motorist must contend with in the operation of his vehicle, and where ice and snow make driving hazardous, a motorist must exercise increased care. Having the duty to approach at an appropriate reduced speed and being required to stop and yield the right of way to an approaching train, Sec. 49-747 and Sec. 49-701, Idaho Code, Ralph vs. Union Pac.

R. Co., 82 Idaho 240, 351 P 2d 464, 468, a motorist must drive at such speed as to be able to perform these duties. If extremely slick roads exist, motorists must driv so that they can stop safely and in time to avoid accidents. Orsbon vs. B. & O. R Co 206 F. Supp 356. If the roads are so slick that they prevent a motorist from stoppin at a time when otherwise he could, then the ice and snow is the proximate cause of th accident. Ineas v. Union Pac. R. Co., 72 Idaho 390, 241 P. 2d 1178.

All of these remarks merely reflect the basic, standard Idaho law relat ing to railroad crossings. Idaho requires a motorist to look and listen and stop if necessary to do so effectively where his view is obstructed, and in any event, to look and listen and do so effectively from a place where to look or to listen is to see or hear. A landmark statement of the Idaho law follows:

> "... A person approaching a railroad-highway crossing, a danger and itself a warning, is required to exercise reasonable care for his safety, and to look and listen from a place of safety, and if necessary to do so, stop and look and listen from a point where his observation is effective and from where had he looked he could have seen, or heard had he listened. He may not go onto the crossing without reasonably using his senses, and while in a place of safety must effectively look and listen and make sufficient careful observation to ascertain whether he may safely proceed before going upon the track in order to avoid any possible accident from approaching trains, and his failure to do so is not excused by the railroad company omitting its statutory duties ....."
>
> Whiffin v. Union Pac. R. Co., 60 Idaho 141, 89 P. 2nd 540, 546.

FAILURE OF NELSON TO STOP WAS PROXIMATE CAUSE OF ACCIDENT

The uncontroverted evidence here establishes that if the motorist had looked, he could have seen. His failure to see first the stop sign and then the train resulted either from his failure to look, or his looking without seeing, which is the same thing, either of which acts constitutes negligence as a matter of law. (see Ca cited following paragraph I, Summary of the Argument with Points and Authorities).

Such acts of negligence supersede any negligence on the part of the Rai road Company and Mr. Fletcher as the same were not concurrent with any negligen

n the part of appellants (although appellants deny they were negligent in any manner) ut came when the effect of any acts or omissions on their part had come to rest gally, and the effect of the negligence of the driver in failing to stop for the stop gn was just commencing. There was nothing at that time which the Railroad Com- any and Mr. Fletcher could have done to avoid the accident. The train was only 600 et - less than 6 seconds - away from the collision, and the testimony is that it was en sounding its whistle and that the headlights were bearing down on the car. lthough well lighted, the train could have been going 20 or 30 miles an hour with a rass band playing on the cow-catcher and this accident still would have occurred. othing the Railroad Company or Mr. Fletcher did or did not do caused an intoxicated river to run a stop sign and drive in front of a brightly lighted, plainly visible train hich, because of its speed and proximity, was an immediate hazard at the crossing.

The only negligence other than speed claimed by appellees so far as the ppellants are concerned is some vague and disputed negative testimony that the itnesses noticed no whistles. Such is not even the kind of negative testimony which ay create an issue when opposed by the positive testimony of witnesses presented th by appellees and appellants that whistles definitely were sounded. A scintilla of idence is not enough to raise a jury issue. Deere vs. So. Pac. R., 9th Circ., 123 2d 438, cert. den. 315 U. S. 819, 86 L Ed 1217.

But as to speed, appellants assert speed has nothing to do with the acci- nt and evidence about it does not raise an issue of negligence on the part of appellants. he Railroad Company had a right to run its trains at this speed - no ordinance or state w prevented it. The crossing and those on either side were protected either by stop gns or by flasher lights and knowledge of this situation surely permitted Mr. Fletcher d the Railroad Company to rely on motorists obeying the law. What would operators a train foresee at crossings protected by stop signs, other than that motorists would ey the signs and yield the right of way to trains? Should Mr. Fletcher be charged

with foreseeing that Nelson would become intoxicated and drive through the stop sign without stopping on glare ice streets at a speed where he could not stop, even though at the stop sign the train would be readily visible and easily heard?

Up until the stop sign was reached, there was no danger to Nelson and the occupants of his vehicle. Until he drove through the sign and proceeded toward the track, he might have stopped, or turned to the right or to the left. Until the inter section was passed, appellants had a right to believe he would turn or stop and yield the right of way to the train. Ralph vs Union Pac. R. Co., supra. The first time the operators of the train could possibly have had notice that Nelson was driving in a grossly negligent fashion was when he passed the stop sign, and by that time the acci dent was inevitable so far as appellants are concerned. Neither speed, nor additiona whistle signals nor additional lights than those already shining ahead of the train coul have prevented Nelson at that time from running in front of the train. Acts which create only conditions and do not proximately cause an accident do not create issues of fact. Rowe vs No. Pac. Ry. Co, 52 Idaho 649, 17 P2d 352.

Idaho law requires motorists to stop not less than 15 and not more than 50 feet from stop signs. Sec. 49-748, 49-747 (3) and (4) and 49-751 (d), Idaho Code. Not only must a motorist stop at stop signs, but he must remain there until safe to continue. With a rapidly moving train within a few hundred feet of the crossing, in plain view in hazardous proximity, obviously it would not be safe to start up again, so that it is apparent the act of Nelson in not stopping at the stop sign constituted the sole proximate cause of the accident, superseding any previous negligence on the pa of appellants. As appellees' own witness Wood testified, he could see the train 1/4 mile away without difficulty when he stopped near the stop sign. He noted its speed and its location, saw it was safe and went ahead, but said if the train had been much closer he would not have gone ahead. (R. T. 228) Since the Nelson car was half a block or more behind him, it is obvious the train was plainly visible at the stop sig for anyone who obeyed the law and stopped and looked. Failure to do so was active,

positive, superseding negligence.

While it is the position of appellants that no evidence of their negligence which was a proximate or contributing cause to the accident has been presented, it must necessarily be their position that decedent Catherine Joan Jarrett was contributorily negligent. Arguably, it can be contended she had a duty to look and listen and to admonish the driver to heed the stop sign and the train, so that either she failed to perform these duties which Idaho law requires of her, Yearout v. Chi. M. St. P. & P. R. Co., supra, or else she performed them but Nelson would pay no attention and deliberately, intentionally tried to beat the train over the crossing. In either of these assumed situations, there would be no liability on the part of appellants.

In a case where suit was brought for the death of a daughter of plaintiffs and it was alleged the train was operated at an excessive speed, that view was obstructed, and that no warnings were sounded, the following instruction was held to be correct so that plaintiffs could not recover.

> "If you find from the evidence in this case that before the automobile in which Lois Bazzell was riding entered upon the track of the defendant railway company, there was an opportunity for her to look and to see the approaching train, and if you further find from the evidence that if she had so looked, she could have seen the approaching train in time to have stopped, or caused to be stopped, the automobile, or warn the driver thereof of the approach of the train, and thereby prevented the collision which resulted in her death, then you are instructed that under the law it is presumed that she did see the approaching train and that it was her duty to immediately stop the automobile, or warn the driver thereof of the approaching train, and not to permit it to enter upon said track in front of said approaching train, if it were possible for her to do so, and failing in this her negligence in that respect will bar a recovery in this action".
>
> Bazzell v. Atchison, T. & Santa Fe Ry Co.,
> 134 Kansas 272, 5 P. 2nd, 804.

The same may be said here of Catherine, for even though she was a young girl she was old enough to keep watch and from the evidence was bright enough to see what went on around her. While the issue of contributory negligence on the part of a passenger at railroad crossings has been clouded by Moran v. Washington, Idaho & Montana RR Co., 9th Cir., 279 F. 2nd 935, a decision of this Court, there

is some doubt as to its viability. This case went entirely on the issue of contributory negligence of the passenger, holding that since the passenger had no control over the movement of the car, he could not be charged with negligent failure to look and listen.

However, almost on the same day that Moran was announced, the Idaho Supreme Court decided a similar case, Yearout v. Chicago, Milw., St. Paul & Pac. R. Co., 82 Idaho 466, 354 P. 2nd 759, and went the other way. There was conflicting evidence as to view and whistle signals at a crossing where the occupants of the car were familiar but view was clear for the last 50 feet of approach to the tracks.

> "However, through the course of the last fifty feet of their approach to the crossing, the occupants of the truck had a clear and unobstructed view along the track in the direction from which the train was coming. If plaintiff was watching for the train, which he said he was, under the rule as announced in Stowers v. Union Pac. R. Co., supra, he was bound to see the plainly visible train. The truck traveling at the low rate of speed could have been stopped at any time during that last fifty feet of its approach to the crossing. Being thus charged with knowledge of the approaching train, in the absence of an emergency situation, it became plaintiff's duty to warn the driver. Plaintiff's failure to do so constituted contributory negligence (citing cases)". P. 763

VERDICT AGAINST DRIVER UNDER GUEST STATUTE ACTS TO ESTABLISH HIS NEGLIGENCE AS SOLE CAUSE

Since in a diversity case the Federal courts must apply the law of the state, it is plain the Moran case has little, if any, authority any more. It would seem that had the Idaho court decided the Moran case, it would have affirmed the lower court. This conclusion is bolstered by the Idaho guest statute. It was inconsistent for the jury to find against both Nelson and appellants, for if Nelson were guilty of negligence, appellants were not. The statute provides:

> "49-1401. Liability of motor owner to guest.--No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or gross negligence".

For the jury here to return a verdict against Nelson, it was necessary

that his acts causing the accident to have been (a) intentional, in which case appellants could not have been liable, also; or caused by (b) his intoxication; or (c) his gross negligence, demonstrating that the same would be an intervening, superseding cause, coming as it did later than any acts of appellants which could have affected the outcome of the accident. Thus, if Nelson were liable, appellants could not be. Nelson did not appeal the judgment entered against the estate so that it has become final.

In a non-railroad case, Hickert v. Wright (Kansas) 319 P. 2nd, 152, defendants had installed a tube in a tubeless tire and the tire blew out, causing an accident which killed a guest in the automobile. The driver was operating the vehicle at a high speed. Two headnotes state:

> "Where two distinct causes of an injury are successive in time, the original act being simple negligence and the subsequent act being gross and wanton negligence, the subsequent act is an independent and efficient intervening cause which produced the injury".
>
> "In action for death of guest in an automobile when a front tire blew out while being driven at a speed of 90 miles an hour brought against defendants who installed an inner-tube in a tubeless tire, amended petition failed to state a cause of action against defendants on ground that gross and wanton negligence of the driver of the automobile was an intervening efficient cause of the accident and that by reason thereof the defendants' negligence was relegated to the status of a remote act and that they were not liable".

In other words, the earlier, simple acts of negligence create only a condition. In our case any negligence on the part of Fletcher or the Railroad Company would be earlier, simple acts which became immaterial as soon as Nelson drove past the stop sign. His acts of driving too fast on icy streets and going through a stop sign without slowing or stopping at a time when he had a high blood alcohol content were decided by the jury, by reason of its entering a verdict against him, to be gross and wanton acts of negligence. Coming later in point of time, it is obvious Nelson's acts were the intervening efficient cause of the accident, and appellants' acts were made remote and non-contributory.

> "The doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability for wrongdoing, and where original wrong only becomes injurious in consequence of

intervention of some distinctive intervening negligent act by others, the proximate cause of the injury will be imputed to the second wrongdoer if the intervening act would have caused the injuries independently of the original wrong".

U.S. v. First Sec. Bank of Utah, N.A., 10th Cir., 208 F 2nd 424, 42 A.L.R. 2nd 951

Nelson's drinking and his driving through the stop sign without exercising any care were acts not reasonably to be anticipated, and would have caused the accident in any event, regardless of what appellants had done.

We feel there is no joint or several negligence here and cases which turn upon that point are not in point. The thrust of our argument, as mentioned above, is that negligence on the part of appellants, if any and it is denied there was any, had ceased to be operative, and the sole, proximate cause of the accident was the negligence of the driver. Thus, how Nelson drove approaching the tracks is pertinent.

"He is bound to use his senses...If, using them, he sees a train coming and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity cannot be case upon the railroad company...'

"These basic rules require, merely, that a person use his senses and that he drive his motor vehicle in a reasonable and prudent manner; and when coming up to a railroad grade crossing, that he look and listen, and stop until he can pass safely; and if he does not, and proceeds thoughtlessly upon the tracks, and thereby receives injury, his contributory negligence will forbid recovery, provided he was in a position that he could have looked, listened and stopped..."
Ralph v. Union Pac. R. Co., Idaho, 351 P. 2nd 464

The existence of trees and bushes, which the exhibits reveal to be only temporary or casual view obstructions to anyone who looks for the moving, bright headlights of an engine, have no significance in view of the stop sign, since a motori can ascertain while stopped whether it is safe to proceed, just as Mr. Wood did in th case. Failure to stop is violation of a positive duty, whether or not there was a stop sign:

"Having in mind the fact that defendant's view of the intersecting highway on his right was obstructed over the course of the last 100 feet of his approach to the intersection, it was his duty to drive at such

'an appropriate reduced speed' and have his car under such control, that he could slow down or stop as need be, when he reached a point where he could see a vehicle approaching from his right in such proximity as to give rise to the hazard of a collision should he proceed. I.C. Sec. 49-701..."

Coughran v. Hickox, 82 Idaho 18, 348 P.2nd 724.

Where there is a stop sign, the duty is even more demanding.

"The fact that defendant's view of Philbin Road to his right was obstructed, imposed upon him an additional burden of care, making it imperative that he stop at or near the stop sign, at a point where he could make an effective observation of the traffic on the Philbin road, before entering the traveled portion of that through highway."

State v. Papse, 83 Idaho 358, 362 P.2nd 1083, 1086.

Especially where there may be view obstructions is the duty to stop at the stop sign significant.

"Plaintiff insists that his view in that direction is blocked. Would the ordinarily prudent person under these conditions abandon all precaution and assume he had a clear field (which he knows he hasn't) or would he drive forward to a point where he could determine whether he was endangered by an approaching train?...

"The circumstance of obscured vision imposed on Fisher more rather than less care." (citing cases)...

"...Unless it is due care to exercise no care to either see or hear at a railroad crossing, a jury could not justifiably find for the plaintiff. We are of the opinion plaintiff's decedent was contributorily negligent as a matter of law".

L. & N. R. Co. v. Fisher (Ky), 357 S.W. 2nd 683.

As was said in a recent Idaho case where an excuse for driving through a stop sign was given that trees and bushes made it difficult to see in that direction:

"The trial court should have instructed the jury that if Tromberg entered the highway in violation of I.C. Sec. 49-730 and of Werth's right-of-way, he was negligent per se... The trial court also should have instructed the jury that the difficulty of seeing through the trees would not have excused such negligence".

Werth v. Tromberg, Idaho, 1965. 409 P.2nd 421, 425.

Appellants contend there was no issue on proximate cause insofar as appellants are concerned to submit to the jury and that it was an error to do so.

"Negligence, to be actionable, must be the proximate cause, or a contributing proximate cause, of plaintiff's injury. Chatterton v. Pocatello Post, 70 Idaho 480, 223 P. 2nd 389, 20 A.L.R. 2d 783; Clark v. Christ 72 Idaho 340, 241 P. 2nd 171....."

"Ordinarily, the proximate cause of an injury is a question of fact for the jury or the court as trier of the facts (citing cases); but in the absence of evidence showing or tending to show a causal connection between defendant's negligence and plaintiff's injury, defendant, as a matter of law, cannot be charged with liability. Chatterton v. Pocatello Post, supra'...

"Where the facts established, or undisputed, and the inferences to be drawn therefrom, are such as to preclude reasonable doubt or difference of opinion, the question of proximate cause becomes one of law for the court. (citing cases)..."

"It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted is not the proximate cause thereof..."

"'It is the well established rule of law that defendant's negligence is too remote to constitute proximate cause of an injury when an independent illegal act of a third person, which could not be reasonably foreseen and without which such injury would not have been sustained, intervenes....'"

Smith v. Sharp, 82 Idaho 420, 354 P.2nd 172

The illegal act of Nelson in driving through the stop sign without stopping first was an act which could not reasonably be foreseen. The operators of the train are entitled to assume that travelers on the highway will obey the law. If Nelson had not driven through the stop sign without stopping, no injury would have been sustained. Thus, any acts or omissions of appellants merely furnished the condition or occasion upon which the injuries were received and did not put in motion the agency by which the injuries were inflicted.

As stated in a case where a passenger sued for personal injuries sustained when the automobile in which he was riding ran into a train on a crossing obscured by fog,

"...Even admitting the negligence of the defendant, where the negligence of the driver is the proximate cause of the accident, neither the driver nor his passenger can recover".

Ranstrom v. Oregon Short Line R. Co., (DC, Ida.)
18 F. Supp. 256

Permitting the jury to speculate as to whetherthere was any negligence on the part of appellants which was the proximate cause of the accident, ignoring the fact that after Nelson failed to stop at the stop sign nothing further could be done by appellants to halt the accident, was error by the trial court. The act of determining in the first instance that no facts existed upon which to base a finding of negligence, or in the second instance, that even if some issue as to negligence could be created, there were no facts from which the jury could find that said negligence contributed to the accident, are conclusions which the trial court properly should have made.

This case does not involve a situation where negligence of two parties concurs to produce a single result, in which situation the accident would not have happened but for such concurrence, nor is it a situation where several causes produce a single injury of which each is an efficient cause, without which the injury would not have happened. Nor does this involve the combining of two independent torts to cause injury where there is no concert of action between the causes. A finding by the jury of negligence against appellants has no legal significance because the injury was caused by acts having no connection with the alleged acts of negligence of Mr. Fletcher and the Railroad Company; whereas a finding of negligence against Nelson serves to exonerate appellants because without his acts, the accident would not have occurred no matter what appellants did or did not do.

Under the circumstances here, where the crossing was protected by stop signs and other crossings in the area either by stop signs or flasher lights, where the operators of the train knew there was a stop sign at Roosevelt and were entitled to rely on drivers approaching the tracks to obey the law, where there were no county or city speed regulations, where over 100 feet of clear vision was afforded travelers after passing the stop sign and where earlier, view to the west was not entirely obstructed, where climatic conditions created a hazard for motorists on the

streets, where the driver of the accident car had 149 mg of blood alcohol in his system some time after the accident when the sample was drawn, and where the train was fully visible and in hazardous proximity when the driver drove through the stop sign, it is the contention of appellants that no facts exist upon which it can be said either Fletcher or the Railroad Company were negligent, and certainly none which contributed to the accident.

A judgment where plaintiffs have failed to make out a case against defendants, or where facts fail to justify a recovery, will be reversed by this Court.

Northern Pac. R. Co. vs. Mealy (9th Cir)
219 F 2d 199

NEW TRIAL SHOULD BE AWARDED IF JUDGMENT NOT REVERSED

The trial court erred in failing to grant a new trial to appellants, even if for argument we assume it need not have granted the motion for judgment notwithstanding the verdict. First, a word about the fundamental difference between consideration of such a motion for judgment and a motion for new trial.

> "...Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weight the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence is sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice".

McCracken v. Richmond, F. & P. Ry. Co., 4th Cir.,
240 F. 2nd 484.

Considering all of the evidence, there can be no question the headlights on the engine were burning and the whistle blowing as the train approached the crossing. This is in accord with the observation of the trial judge. (R. T. 405) These facts, added to the unobstructed view afforded from the vicinity of the stop sign, and

the familiarity of the driver with the crossing, and his speed in approaching and in failing to stop for the stop sign, mean that the verdict of the jury against the Railroad Company and Mr. Fletcher was contrary to the weight of the evidence and for that matter, to the instructions of the court.

The facts do not need to be discussed again, nor the law applicable thereto. The situation here may be summarized in this fashion, perhaps: A motorist who had been drinking heavily drives too fast on slick, icy streets and at this excessive speed drives right through a stop sign without stopping and up onto tracks in front of a clearly visible, fast approaching train which is, at that moment, in hazardous proximity to the crossing, yet the jury finds against the engineer of the train and the Railroad Company. A new trial for Mr. Fletcher and the Railroad Company is warranted.

DAMAGES ARE EXCESSIVE

If the action is not reversed as to appellants, or a new trial is not granted, then the Railroad Company and Mr. Fletcher urge to the Court that the amount of the verdict in this action is so large and extraordinary that it surely must have been rendered under the influence of passion and prejudice, and is such as to shock one's conscience. Especially is this true in connection with the Railroad Company and Mr. Fletcher where there is little, if any, evidence of negligence which could be said, even remotely, to have contributed to the accident. The jury may well have felt some bitterness and disgust at the action of Mr. Nelson who was operating his vehicle as a drinking driver at too fast a speed in a grossly negligent manner. The jury seems to have been attempting to inflict punishment or retribution on the parties, but whatever the motive, the result far exceeds the bounds of justice and the permissive limits of the law.

The Idaho wrongful death statute provides:

"5-310. Action for injury to child. -- The parents may maintain

an action for the injury or death of a minor child, . . when such injury or death is caused by the wrongful act or neglect of another. . . ."

"5-311. -- Action for wrongful death. -- When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just". (emphasis furnished)

It will be noted at once that there is no particular standard contained in the statute by which to measure damages, although they must be "just" under all the circumstances. Damages are presumed, where there is a relationship. However, there must be some reasonable relationship between the injuries sustained and the damages awarded. Grief and anguish are not allowable items of damage. Hepp v. Ader, 64 Idaho 240, 130 P. 2nd 859.

The size of a jury award of damages can be reviewed by the appellate court. Dagnello v. Long Island R.R. Co., 2nd Cir., 289 F2nd 797. The decision of this court in Covey Gas & Oil Co. v. Checketts, 9 Cir. 1951, 187 F 2nd 561, 563, was cited therein to the same effect. It is stated in Dagnello:

"In some cases the very amount of the verdict is said to justify the inference that the verdict was brought about by passion or prejudice, although it seems to us that this is just another way of saying the verdict is too high." 289 F. 2nd 797, at 802.

In the Dagnello Case Judge Medina said the reason most appealing to him that the Seventh Amendment does not bar appellate review of the rulings of trial judges regarding new trials for excessiveness of verdicts is that "Without judicial supervision over what Blackstone called the 'misbehavior' of juries, a trial by jury would lack one of 'the essentials of the jury trial as it was known to the common law before the adoption of the Constitution'." Pg. 805.

The various words used by the different courts of appeal for reviewing the award such as "monstrous", "outrageously excessive", "shocking to the judicia conscience", he said, are just words of description, meaning really that the action

of the reviewing court must be sound, and not arbitrary, and that it must be "exercised in the light of the record in the case and within the limits prescribed by reason and experience". Pg. 802. The primary question then, is whether the verdict is too high.

The award in this case for a 14 year old girl was $60,000.00. No proper person, of course, would take money in exchange for a child. Are there, then, no yardsticks to measure the amount? Admittedly, there are not very many, but there are some. For one thing, an award must be "compensatory to a damaged heir and not as a punitive measure to mulct the tort-feasor out of a penalty". Hepp v. Ader, supra. Thus, the circumstances of the heir become pertinent. As well, there must be a reasonable relationship between the injuries sustained and the damages awarded. Checketts v. Bowman, 70 Idaho 463, 220 P. 2nd 682.

There are only a few cases in Idaho on the subject of damages awarded in wrongful death actions. One accident brought about two cases which are most instructive and which should be very persuasive in this court. An 8 year old boy was killed in an accident and his parents brought suit against the employer and his employee under the wrongful death action. Checketts vs. Bowman, supra. An award of $40,000.00 was reduced to $20,000.00. Following remittitur, plaintiffs dismissed and filed suit in Federal Court on the same claim. This time the award was $35,407.50, and upon appeal this Court, in Covey Gas & Oil Co. v. Checketts, 9th Cir., 187 F. 2nd 561, reduced the award again to $20,000.00.

In the state case the court considered what evidence would be pertinent to an award.

> "Under the statute, 'such damages may be given as under all the circumstances of the case may be just'. 5-311, I.C. Elements entering into the determination of such damages include: Contributions which the parents might reasonably have expected to receive from the earnings of the deceased during his minority; and comfort, society and companionship deceased would have afforded to them had he lived. (citing cases)... Grief and anguish are not to be considered .... Some courts have broadened the base of allowable recovery to include loss of prospective comfort, care, protection and assistance during the common life expectancies of the parent and child".

It is unrewarding, of course, to consider other verdicts, since the circumstances vary so widely from case to case, and the law is varied from jurisdictio to jurisdiction, but the two Checketts cases should provide much guidance since they involve Idaho law and young minors. Even in the case of a boy, where parents reasc ably can expect to obtain contributions from his earnings, prior to his reaching majc ity, and might reasonably expect to benefit from his comfort, society and companion ship then and in later life, an award for the life of a younger child whose parents would live just that much longer was thought to be excessive when more than $20,000.00. While there has been some change in the value of a dollar between 1951 and 1965, the comparison between $20,000.00 for an 8 year old boy and $60,000.00 for a 14 year old girl is rather startling and far in excess of any inflation the dollar has suffered.

It is unlikely that the young girl involved in our case would contribute anything to her parents during her minority. She would be a considerable expense to them, in fact, as girls are. While these facts do not change the question of liability, if it is thought to exist, they do have an effect upon the reasonableness and size of the award.

As well, here is a young girl who has 5 older sisters, all married and living away from home. The parents have moved to Kansas, away from these daughters. This young girl was attractive and if her older sisters are any indication would soon be married. Once she was married, any cause of action for her death would lie not in her parents, but in her own spouse and children, if any. Thus, the comfort, companionship and society which may be considered as being a basis for damages can be reasonably be anticipated by the parents only until the girl is married. And while after marriage she could provide as much comfort, companionship and society as any of her married sisters, this must be tempered by the demands he own family would make. The loss would be to her own household, not that of her parents. These are very real considerations which become pertinent under a statute

which permits reference to "all the circumstances" of the case.

Few of the elements set out in the Checketts case upon which damages could be based exist here. No contributions can be anticipated; prospective assistance and protection almost are non-existent. This means the only basis for the award of $60,000.00 is comfort, society and companionship, present and future. There is no showing in the record of any special attributes which Catherine Jarrett had which would justify unusual or extraordinary damages from her loss.

If Catherine were, instead, a wage earner who left a family, loss of earnings, of contributions to the family and the direct benefit of care, training, protection and guidance would be present to support a substantial award. A wife might have to go to work. Children might be left fatherless. With a 14 year old girl, however, none of these things is present. All of these factors go to reveal not that no damages at all are shown, because damages are presumed, but that an award of $60,000.00 is so far beyond any reasonable, logical, rational award that it can have been given only under passion and prejudice against the near-drunken driver who practically murdered the young girl. As far as the Railroad Company and Mr. Fletcher are concerned, however, there is no justification or even excuse for such an excessive award. To use the words of Judge Medina quoted above, this award is "just too high".

The testimony of Mr. and Mrs. Jarrett as to comfort, society and companionship, in fact, for the most part does not relate to those features but relates to grief and anguish instead, (R.T. 277, 279, 313, 314), and these are not items of damage as to wrongful death actions. This award far exceeds an amount which would be "compensatory to a damaged heir", Hepp v. Ader, supra. Especially is this true because what we are dealing with here is not the death of a father and husband, where there is a reasonable basis for estimating the loss of services, food, support and the like, but rather the death of a young girl who would be until her marriage an expense to the family and who would contribute nothing material to the family. While

appellants do not contend the award should be nominal, if one is thought to be justified at all, neither should it be "too much" and certainly $60,000.00 is too much, especially when compared to the Checketts cases where both the state and federal court thought around $40,000.00 was much, too much for a young boy.

There never has been an award in Idaho for anything even near the sum awarded in this case. This in itself should be indicative that the inflated money values of some communities do not apply in Idaho. But unless this Court is prepared to say there are no limits whatsoever to an award for the death of a 14 year old girl with no unusual talents who is making no contributions to her parents and who likely will be married and away from home soon, the award here is excessive.

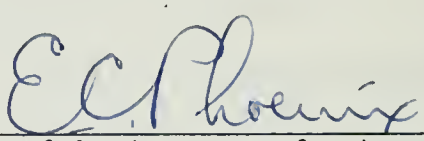
Awards in other states and under other circumstances are not of much help to the court. A few are very large, but they are so few as to indicate they are maverick cases. Upon closer examination, most such cases are in states which permit grief, sorrow and anguish to be considered as elements of damage, contrary to the law in Idaho. Checketts v. Bowman, supra. On the other side of the coin are the many cases where excessive awards of this amount and lower have been reduced by the appellate courts. In fact, in no case which defendants can find during the last two years is there an award anywhere near the one in this case which has been permitted to stand, whether or not the state is among those considered "liberal" in its awards. For instance, $22,500.00 for an 11 year old girl reduced to $15,000.00 in Tedrow v. Fort Des Moines Community Services, Inc., (1963), 117 N.W. 2nd 62; $20,000.00 for an attractive 8 year old girl reduced in Burch v. Gilbert (1963), 148 So. 2nd 269; $75,000.00 for a 5 year old child held excessive and reduced in Bush Const. Co. v. Walters (1964), 164 So. 2nd 900; $55,000.00 excessive for a 15 year old boy who earned money, contributed to the family expenses and bought all his own clothes, in LeBoeuf v. Newman (1964), 251 N.Y.S. 2nd 72, and so forth. New or old cases, remittiturs are common, as these cases do indicate, the determination being whether there is any rational justification for a large award. Appellants sub-

mit that in this action there can be no rational justification for an award of $60,000.00, at least against the Railroad Company and Mr. Fletcher.

SUMMARY

These appellants contend it was error for the trial court to submit the case to the jury insofar as the Railroad Company and Mr. Fletcher were concerned, there being no evidence of negligence on their part which was a proximate or contrib ting cause to the accident; further, that even if there was an issue, the verdict of the jury as to appellants was against the weight of the evidence and a new trial shoul be ordered. Even if a new trial is not required, the verdict as to the Railroad Company and Mr. Fletcher was so gross and excessive that a new trial should be ordere on that basis, or the amount of the verdict reduced to a more reasonable figure.

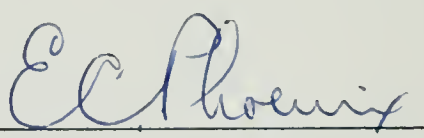
Respectfully submitted,



One of the Attorneys for Appellants
Union Pacific Railroad Company
and Mark Fletcher

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney

APPENDIX OF EXHIBITS

Exhibits	Description	Identified	Offered	Recd. or Rejected
Pl's # 1	Aerial Photograph	R. T. 23	R. T. 24	RT 26
Def. # 2	Photograph	" 27	" 30	" 68
Def. # 3	Photograph (Rejected)	" 21	" 30	" 68
Def. # 4	Photograph	" 21	" 30	" 68
Def. # 5	Photograph	" 21	" 30	" 123
Def. # 6	Photograph	" 21	" 30	" 68
Def. # 7	Photograph	" 21	" 30	" 68
Def. # 8	Photograph	" 21	" 30	" 68
Def. # 9	Photograph (Rejected)	" 21	" 30	" 68
Def. # 10	Photograph	" 21	" 30	" 68
Def. # 11	Photograph (Rejected)	" 21	" 30	" 68
Def. # 12	Photograph	" 21	" 30	" 68
Def. # 13	Photograph (Rejected)	" 21	" 30	" 68
Def. # 14	Photograph	" 21	" 30	" 68
Def. # 15	Photograph	" 21	" 30	" 34
Def. # 16	Photograph	" 21	" 30	" 34
Def. # 17	Photograph	" 21	" 30	" 34
Def. # 18	Photograph	" 21	" 30	" 34
Def. # 19	Photograph	" 21	" 30	" 34
Def. # 20	Photograph	" 21	" 30	" 34
Def. # 21	Panoramic photograph	" 48	" 50	" 100
Def. # 22	Panoramic photograph	" 51	" 51	" 99
Pl's # 23	Report Card	" 109	" 109	" 109
Pl's # 24	Rules Book UPRR (Rejected)	" 133	" 134	" 134
Pl's # 25	Time Table, UPRR	" 135	" 135	" 135
Pl's # 26	Speed tape (rejected)	" 144	" 145	" 146
Pl's # 27	Speed tape	" 178	" 178	" 178
Pl's # 28	Picture of Miss Jarrett	" 186	" 187	" 187
Pl's # 29	Report Card	" 187	" 188	" 188
Pl's # 30	Report Card	" 191	" 191	" 191
Pl's # 31	Report Card	" 195	" 195	" 196
Def. # 32	Statement of Wood	" 213	" 213	" 215
Def. # 33	Lab report, blood test	" 238	" 239	" 302
Pl's # 34	Traffic count, Roosevelt Street (Rejected)	" 253	" 254	" 254
Pl's # 35	Traffic count, Roosevelt Street (Rejected)	" 255	" 256	" 256
Pl's # 36	Photograph	" 261	" 262	" 262
Pl's # 37	Photograph	" 261	" 262	" 262
Pl's # 38	Photograph	" 261	" 262	" 262
Pl's # 39	Photograph	" 261	" 262	" 262
Pl's # 40	Report Card	" 326	" 327	" 327
Def. # 41	Engineering drawing of crossing	" 335	" 336	" 336
Def. # 42	Photographs composing Exhibit 21	" 347	" 348	" 349
Def. # 43	Panoramic photograph	" 351	" 354	" 356

Section 49-701, Idaho Code. Basic Rule and Prima Facie limits.

(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all person to use due care.

(b) Where no special hazard exists that required lower speed for compliance with paragraph (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Thirty-five Miles per hour in any urban district;

2. Sixty miles per hour in other locations during the daytime.

3. Fifty-five miles per hour in such other locations during the night-time.

The prima facie speed limits set forth in this section may be altered as authorized in sections 49-702 and 49-703.

(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Section 49-747, Idaho Code. Railroad grade crossing - Obedience to signal indicating approach of train. -

(a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within 50 but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

1. A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;

2. A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;

3. A railroad train approaching within approximately 1, 500 feet of the highway crossing emits a signal audible from such

distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

4. An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

(b) No person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed.

Section 49-748, Idaho Code. All vehicles must stop at certain railroad grade crossings. -

The department of highways and local authorities with the approval of the department of highways are hereby authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad and shall proceed only upon exercising due care.

Section 49-751, Idaho Code. Stop signs and yield signs. -

(a) The department of highways with reference to state roadways and local authorities with reference to other roadways under their jurisdiction may designate through roadways and erect stop signs or yield signs at specified entrances thereto or may designate any intersection as a stop intersection or as a yield intersection and erect stop signs or yield signs at one or more entrances to such intersection.

(d) Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side of the intersection or in the event there is no cross walk shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection.